FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 10 1941
CHARLES ELMORE CROPLEY
CLERK

No. 256

IN THE

Supreme Court of the United States

OCTOBER TERM—1941

DR. MAXIMILIAN GOLDSTEIN, DR. BENJAMIN SCHWARTZ, HERMAN RUBIN and IRVING ELENTUCH,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF THE PETITIONERS

THEODORE KIENDL,
Attorney for Petitioner,
Dr. Maximilian Goldstein.

LESTER R. BACHNER,
Attorney for Petitioner,
Dr. Benjamin Schwartz.

SIDNEY J. LOEB,
Attorney for Petitioner,
Herman Rubin.

BENJAMIN KRONENBERG,
Attorney for Petitioner,
Irving Elentuch.

INDEX

PAGE

A. The Question Is Raised by This Record 2

B. The Question Is Important 3

C. The Question Was Erroneously Decided by the Court Below 5

CONCLUSION 7

Authorities Cited:

Nardone v. U. S., 308 U. S. 338 (1939) 1, 3, 4, 7

Nardone v. U. S., 302 U. S. 379 (1937) 4

Weiss v. U. S., 308 U. S. 321 (1939) 3, 4, 7

IN THE

Supreme Court of the United States

OCTOBER TERM—1941

DR. MAXIMILIAN GOLDSTEIN, DR. BENJAMIN SCHWARTZ, HERMAN RUBIN and IRVING ELENTUCH,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF THE PETITIONERS

The contentions of the Government with respect to the trial court's conduct of the preliminary hearing and his charge to the jury have been anticipated and answered in petitioners' main brief (pp. 27-29). There is no need to repeat those answers here, although we may emphasize that this case presents the first opportunity which has arisen to review the application of the rules laid down by this court in *Nardone* v. *U. S.*, 308 U. S. 338 (1939), governing a preliminary hearing to investigate the Government's use of intercepted telephone communications. By virtue of that fact alone, this case presents a question of sufficient novelty and importance to require the granting of a writ of *certiorari*.

This reply brief is devoted to an analysis of the Government's position upon the first two points raised by the petition, both of which are concerned with the decision of the court below that petitioners have no standing to complain of the Government's interception, divulgence and use of telephone communications.

A. *The Question Is Raised by This Record.*

The Government attempts to avoid this issue, perhaps the most important one in the case, by contending that it is not presented (Br. pp. 13-14). This contention is patently unsound. The Circuit Court of Appeals viewed this case as involving three principal issues: (1) in view of the conceded fact that "wire tapping" had been employed, was the burden upon the Government to prove that the confession and testimony of Messman and Garrow were not procured through the use of the intercepted messages, (2) if so, had the Government satisfied that burden of proof, (3) if not, could that testimony nevertheless be used against these petitioners because of the fact that they were not parties to the messages.

Upon the first two issues the court held that (1) the burden of proof was on the Government; (2) upon the findings and evidence contained in this record, the Government had failed to satisfy that burden. Hence, the court inevitably was called upon to decide the third issue, and only by deciding it adversely to petitioners was the affirmance of their conviction possible.

While it agrees that the burden of proof rested upon it, the Government now urges that the court below should have held that the Government had discharged that burden and hence should not have found it necessary to consider the question of petitioners' status. This comes down to asserting that the decision below should not be reviewed because it is wrong. This is surely a paradoxical argument for the Government to make and, moreover, a fallacious argument as well, for it attributes entirely too great a significance to the particular order in which the court below discussed the three points in its opinion. If it had happened that the Circuit Court of Appeals had first discussed the question of *locus standi*, it could equally well be argued

that there would have been then no occasion for the court to pass upon the issues of the burden and quantum of proof. It is clear that all three questions were in the case, and the order of their decision is wholly immaterial. The fact that two of these questions were decided in favor of petitioners cannot prevent them from seeking a reversal because of the error committed in deciding the third question against them.

B. *The Question Is Important.*

The Government asserts that the problem here involved is not likely to arise again, because it cannot be assumed that henceforth enforcement agencies will intercept telephone messages (Br. p. 16). Certainly, it cannot be assumed that they will not. Past history and experience indicate that the probabilities are that the practice will continue, and, particularly if the decision below is permitted to stand.* That decision has so qualified Section 605, as interpreted by this court in the *Nardone* and *Weiss* cases, that it has rendered evidence obtained by such means admissible in many federal criminal prosecutions. Where evidence is admissible, prosecutors will seek to obtain it. Years of experience under the Fourth Amendment have proved this to be the fact. There is no reason to believe that Section 605 will be any more efficacious in preventing wire tapping than the Fourth Amendment has been in preventing unreasonable searches and seizures.

---

* It may be observed that the public press records the disclosure of the tapping of wires by Department of Justice agents as late as August, 1941, in connection with one, Harry Bridges, said disclosure having been made in the course of a hearing before the Senate Judiciary Committee. See New York Times, September 4, 1941, Page 9; New York Herald Tribune, September 4, 1941, Page 8; PM, August 28, 1941, Page 18; August 29, 1941, Page 19, cf. Editorial Comment; PM, September 7, 1941 (Editorial—Labor Section).

Morever, it may be observed that persons other than federal officials have engaged and will engage in wire tapping. Private investigators will continue to avail themselves of this means of obtaining evidence to be laid before prosecuting authorities, and state officials in many states where the practice is countenanced will pursue it. The only effective method of enforcing the will of Congress as expressed in Section 605 is to render evidence thus obtained inadmissible for any purpose against any defendant.

By successive decisions this court has determined three important questions of construction of Section 605. The statute was first held applicable to the disclosure in open court of interstate communications [*Nardone* v. *U. S.*, 302 U. S. 379 (1937)], then to the disclosure in open court of intrastate communications [*Weiss* v. *U. S.*, 308 U. S. 321 (1939)], and finally, to the use of intercepted communications in advance of trial as a means of obtaining other evidence [*Nardone* v. *U. S.*, 308 U. S. 338 (1939)]. This case raises the fourth and final question of importance. Its decision is necessary in order to complete the pattern. The force of the three previous decisions defining the scope of the statute will wane and in some measure impair as long as there is doubt as to whether the protection of the statute is available to all defendants or only to a limited class.

The fact that the question of defendant's standing to complain was actually involved in the *Weiss* case does not obviate the necessity of reviewing the decision in the case at bar. Because of the absence of any discussion of the point in the opinion of this Court in the *Weiss* case, the court below has declined to follow that holding. If the decision below is permitted to stand, it will constitute a precedent for other courts, in spite of the fact that the opinion below contains statements of the law which even the Government concedes to be erroneous. Other judges who

may read only the opinion and not the record in the *Weiss* case may well be unaware of the fact that the point was there presented and may assume that the decision of the court below in the case at bar properly states the rule. Still other courts may take a different view of the decision in the *Weiss* case and hence may reach an opposite result. Uncertainty may be removed only by an express ruling of this Court deciding the issue once and for all.

C. *The Question Was Erroneously Decided by the Court Below.*

The key to the fallacy in the reasoning of the Circuit Court of Appeals is found in the alternative ground which that court gave for its conclusion. The court first construed Section 605 as conferring a privilege personal to the sender of the message. It then held, by analogy with the lower federal court cases construing the Fourth Amendment, that only the sender (*i.e.*, parties to the conversation) could take advantage of the protection of the statute. The court realized, however, that the analogy could be attacked on the ground that the language of the Communications Act was more imperative than that of the Fourth Amendment. Consequently, in an effort to avoid this argument, the court held, as an alternative ground, that in any event the analogy between the Act and the Fourth Amendment was exact as far as the "use" of the intercepted messages prior to the trial was concerned, on the theory that the Act does not expressly forbid "use" and hence is no more explicit in this particular respect than the amendment. The court therefore reached the conclusion that persons not parties to the communication have no right to complain of the "use" of those communications prior to the trial, regardless of what their rights may be in the event that the communications themselves are offered in evidence at a trial.

The conclusion thus reached by the court below is manifestly unsound since, as the Government now concedes (Br. p. 16), the premise upon which it is based is false in fact. Section 605 does expressly prohibit "use". It reads:

> "No person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect or meaning of the same, or any part thereof, * * * shall divulge * * * or *use* the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto".

The court below entirely overlooked this provision. Having overlooked it, it proceeded to find an analogy between the Act and the Amendment where none in fact exists.

The Government's brief does not weaken the force of this significant distinction. It is argued (Br. p. 15) that the Fourth Amendment "as judicially construed" forbids "use" and that hence "there is no reason why a comparable statutory inhibition should require or be given more drastic sanction". Here we have the same type of fallacy as is exemplified by the opinion below. The "statutory inhibition" of Section 605 in fact is *not* comparable to that of the Fourth Amendment. Consequently, the judicial construction which must be given to the statute must be different from that which has been given to the Amendment. Inasmuch as the Amendment does not prohibit use, the lower federal courts could properly construe it as conferring a privilege only upon the owner of the property, which could not be availed of by any third person. Here, however, there is no room for so limited an interpretation.

Finally, the Government suggests that defendants who are not parties to intercepted messages should not be permitted to "inaugurate elaborate collateral inquiries into possible violations of the statutory immunities of other per-

sons". (Br. p. 16). Of course, this begs the question. It assumes that persons other than parties to the communications do not have the benefit of the statutory immunities, which is the very point at issue.

CONCLUSION.

The question raised by this record as to the petitioners' standing to complain is of vital importance in the construction of Section 605. The result reached by the Circuit Court of Appeals has drastically limited the Communications Act and has gone far to undermine the liberal construction of that Act announced by this court in the *Nardone* and *Weiss* cases. Moreover, the construction of the court below, far from being required by the language of the statute, runs counter to its express terms. Therefore this case is an appropriate one for review by this court. The writ of *certiorari* should be granted.

Dated, New York, September ——, 1941.

Respectfully submitted,

THEODORE KIENDL,
Attorney for Petitioner,
Dr. Maximilian Goldstein.

LESTER R. BACHNER,
Attorney for Petitioner,
Dr. Benjamin Schwartz.

SIDNEY J. LOEB,
Attorney for Petitioner,
Herman Rubin.

BENJAMIN KRONENBERG,
Attorney for Petitioner,
Irving Elentuch.